Supreme Court, U.S.
FILED
MAY 8 1992
OFFICE OF THE CLERK

(8)

No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY McQUILLAN, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENTS SHIRLEY AND LARRY McQUILLAN

* Jeffrey M. Shohet
Marcelle E. Mihaila
Gray, Cary, Ames & Frye
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-2743
Counsel for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I

INTRODUCTION

This petition for certiorari (91-32 or the "S.I. petition") is one of two petitions arising out of this lawsuit. In the other petition (91-10 or the "Spectrum petition"), the Court on March 30, 1992 granted certiorari on a single issue, the so-called *Lessig* issue. It appears the Court intends to defer decision on the S.I. petition until it decides the Spectrum petition.

The purpose of this supplemental brief is to request that the Court decide the S.I. petition without awaiting resolution of the spectrum petition. Both petitions for certiorari raise, among other issues, an issue pertaining to *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964). However, the two petitions raise different *Lessig* issues. Moreover, *Lessig* applies only to claims arising under Section 2 of the Sherman Act. The S.I. petitioners, however, were adjudged liable for two Section 1 violations as well. Thus, even this Court's determination of the broadest possible *Lessig* issue in the Spectrum petition (i.e., the validity of the *Lessig* doctrine) would not be dispositive of respondents' antitrust claims against the S.I. petitioners.

This case has been in the legal system for eight years. Respondents' business was destroyed as a result of the wrongful acts of the petitioners and respondents have already waited four years since this case was tried to enforce their judgment. Since the resolution of the spectrum petition is not dispositive of respondents' Section 1 antitrust claims against the S.I. petitioners, further delay in consideration of the S.I. petition would appear to be unnecessary.

II

BACKGROUND

The two petitions for certiorari arise out of a jury verdict in favor of respondents. The jury found that Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company and Kenneth Leighton, Sr., (the "S.I. petitioners") were liable for two separate violations of Section 1 of the Sherman Act – resale price maintenance and horizontal market allocation. The jury also found the S.I. petitioners – along with Spectrum Sports, Inc., and Kenneth Leighton, Jr. (the "Spectrum petitioners") – liable for monopolization, attempt to monopolize or conspiracy to monopolize under Section 2 of the Sherman Act. The jury also found the defendants liable on multiple claims under RICO and state law.[1] The jury awarded compensatory damages of $1,743,000 which the district court trebled. The district court awarded $912,033.50 in attorney's fees and costs and entered judgment in favor of respondents for $6,141,032.

Both the S.I. petitioners and Spectrum petitioners filed notices of appeal. On July 3, 1990, the Ninth Circuit Court of Appeals affirmed the judgment in an unpublished memorandum decision. (S.I. Petition For Cert. App. 3-31.) All petitioners then filed a petition for rehearing. On April 1, 1991, the Ninth Circuit modified

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[1] The jury found the Spectrum petitioners liable for interference with prospective advantage and violations of California Unfair Competition law, but not for fraud, violations of the Cartwright Act, or section 1962(a) of RICO. Special Verdict Form II, VIII-IX, XIV-XVIII.

one sentence of its decision but otherwise denied the petition for rehearing. (S.I. Petition For Cert. App. 32-33.)

The S.I. petitioners and the Spectrum petitioners then filed separate petitions for certiorari. As their first "Question Presented," the Spectrum petitioners asked:

> "Whether a manufacturer's distributor *expressly absolved of violating Section 1 of the Sherman Act can,* without any evidence of market power or specific intent, be found liable for attempting to monopolize solely by virtue of a unique Ninth Circuit rule [the *Lessig* doctrine]?" [emphasis added] (Spectrum Petition For Cert., p. i.)[2]

The S.I. petitioners framed a different and far broader *Lessig* question:

> "Can a verdict of attempt to monopolize in violation of Section 2 of the Sherman Act be sustained when the jury has not been charged that it must find either specific intent or a dangerous probability of success?" (S.I. Petition for Cert., p. i)[3]

On March 30, 1992, the Court granted certiorari on the Spectrum petition limited to the *Lessig* issue. The Court apparently has conferenced at least twice on the

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[2] The Spectrum petitioners also posed a question regarding whether a replaced distributor can be liable for treble damages "where the replacement was devoid of predatory conduct." (Spectrum Petition For Cert., p. i.)

[3] The S.I. petitioners also posed two other issues. One related to the application of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The other related to whether the jury should have been given an instruction on antitrust injury. (S.I. Petition, p. i.)

S.I. petition, but has neither granted nor denied certiorari. Thus, it appears the Court may have decided to leave the S.I. petition pending until it decides the merits of the *Lessig* issue in the Spectrum petition on which it granted certiorari.

III

THE COURT SHOULD NOT LEAVE THE S.I. PETITION UNRESOLVED PENDING RESOLUTION ON THE MERITS OF THE *LESSIG* ISSUE RAISED BY THE SPECTRUM PETITION

The interests of justice will not be served if the S.I. petition is left pending until the Court decides the merits of the *Lessig* issue posed by the spectrum petition. First, the two petitions pose very different *Lessig* issues. The issue on which the Court granted certiorari in the Spectrum petition focussed on the propriety of a *Lessig* instruction where the defendant is not found liable on any Section 1 claims. Unlike the Spectrum petitioners, however, the S.I. petitioners *were* found liable on two different Section 1 claims.

More significantly, even if the Court generally overrules, or otherwise limits the *Lessig* doctrine in deciding the Spectrum Petition, that determination of the *Lessig* issue will not be dispositive of all of respondents' antitrust claims against the S.I. petitioners. As noted above, the jury found the S.I. petitioners liable on two Section 1 claims. *Lessig* relates only to attempt to monopolize (a Section 2 claim) and has nothing to do with these Section 1 claims. Indeed, the United States as amicus curiae recognized this fact and stated:

> "The *Lessig* issue alone could make no difference to the outcome of the Sorbothane petitioners' case (No. 91-32) because they were found liable on two Section 1 counts." (Brief for the United States, p. 16.)

Elsewhere, the United States recognized:

> "And the resale price fixing verdict alone would suffice to support the entire award of damages – which was the only relief awarded." (Brief of the United States, p. 14, note 11.)

Thus, even if the Court completely overrules *Lessig* in the Spectrum Petition, it will not affect respondents' right to recover against the S.I. petitioners on the Section 1 claims – either of which supports the entire judgment.

The Court's resolution of the Spectrum petition unavoidably involves significant delay. Respondents, however, have limited financial resources and are severely delinquent in repaying Small Business Administration loans. This judgment is obviously of enormous significance to them. It creates an unnecessary hardship to respondents to delay resolution of the S.I. petition pending the Court's determination of the spectrum petition since that determination, whatever it is, is not dispositive of respondents' antitrust claims against the S.I. petitioners.

IV

CONCLUSION

Based on the above, respondents respectfully request that the Court decide the S.I. petition for certiorari without awaiting resolution of the spectrum petition.

Respectfully submitted,

JEFFREY M. SHOHET

May 8, 1992